No. 09-868 JAN 19 2010

In The
Supreme Court of the United States

A.T. WALL, Director,
Rhode Island Department of Corrections,

Petitioner,

v.

KHALIL KHOLI,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a state court sentence-reduction motion consisting of a plea for leniency constitute an "application for State post-conviction or other collateral review," 28 U.S.C. § 2244(d)(2), thus tolling the Anti-Terrorism and Effective Death Penalty Act's one-year limitations period for a state prisoner to file a federal habeas corpus petition, an issue as to which there is a 3-2 circuit split?

PARTIES TO THE PROCEEDING

Khalil Kholi was the petitioner-appellant in the courts below and is the Respondent in this Court. The Rhode Island Department of Attorney General was, by order of the district court, the designated respondent, on behalf of A.T. Wall, Director of the Rhode Island Department of Corrections, and appellee in the courts below, and is the Petitioner in this Court.

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OPINIONS BELOW

The First Circuit's panel opinion in *Kholi v. Wall* is reported at 582 F.3d 147 (1st Cir. 2009), and set forth in App. 2-20. The December 28, 2007, district court Order, App. 21, is unreported. Such Order is, however, along with the December 11, 2007, magistrate judge's Report and Recommendation, App. 22-31, that it adopted, available at 2008 WL 60194 (D.R.I. Jan. 3, 2008).

STATEMENT OF JURISDICTION

The panel of the Court of Appeals issued its opinion and entered judgment for the respondent on September 23, 2009. App. 1. Thereafter, on October 20, 2009, the Court of Appeals entered an Order denying Petitioner's timely motion for rehearing *en banc*. App. 32-33. The 90-day period for filing a petition for certiorari ends on January 19, 2010. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTE & PROCEDURAL RULE INVOLVED

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), P.L. 104-132, §§ 101, 106, 110 Stat. 1214, 1217 (1996), in particular, the portion codified at 28 U.S.C. § 2244(d), provides in pertinent part:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the federal predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

App. 34-37 (28 U.S.C. § 2244(d)).

Rule 35 of the Rhode Island Superior Court Rules of Criminal Procedure provides:

> The court may correct an illegal sentence at any time. The court may correct a sentence imposed in an illegal manner and it may reduce any sentence when a motion is filed within one hundred and twenty (120) days after the sentence is imposed, or within one hundred and twenty (120) days after receipt by the court of a mandate of the Supreme Court of Rhode Island issued upon affirmance of the judgment or dismissal of the appeal, or within one hundred and twenty (120) days after receipt by the court of a mandate or order of the Supreme Court of the United States issued upon affirmance of the judgment, dismissal of the appeal, or denial of a writ of certiorari. The court shall act on the motion within a reasonable time, provided that any delay by the court in ruling on the motion shall not prejudice the movant. The court may reduce a sentence, the execution of which has been suspended, upon revocation of probation.

R.I.R. Crim. P. 35(a).

STATEMENT OF THE CASE

In December 1993, a Rhode Island jury convicted Khalil Kholi of ten counts of first degree sexual assault, in violation of R.I. Gen. Laws § 11-37-2, for molesting his two stepdaughters. App. 3. The Rhode

Island Superior Court sentenced Kholi to six concurrent life sentences, to run consecutive to four concurrent life sentences. App. 3. The Rhode Island Supreme Court affirmed Kholi's judgment of conviction on February 29, 1996, in *State v. Kholi*, 672 A.2d 429 (R.I. 1996). App. 3-4. Kholi did not petition the Rhode Island Supreme Court for reargument or this Court for the issuance of a writ of certiorari. App. 4.

On May 16, 1996, Kholi filed a motion to reduce sentence in the Rhode Island Superior Court pursuant to Rule 35(a) of the Rhode Island Superior Court Rules of Criminal Procedure. App. 4. The superior court denied Kholi's motion on August 27, 1996, a decision that the Rhode Island Supreme Court affirmed on January 16, 1998, in *State v. Kholi*, 706 A.2d 1326 (R.I. 1998). App. 4.

On May 23, 1997, while his motion to reduce sentence was pending, Kholi filed an application for post-conviction relief in the Rhode Island Superior Court pursuant to R.I. Gen. Laws §§ 10-9.1-1 to 10-9.1-12. App. 4. The Superior Court ultimately denied that post-conviction relief application on April 23, 2003, a decision the Rhode Island Supreme Court affirmed on December 14, 2006, in *Kholi v. Wall*, 911 A.2d 262 (R.I. 2006). App. 4-5.

Nearly nine months later, on September 5, 2007, Kholi filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of Rhode Island. App. 5.

The Attorney General for the State of Rhode Island ("State"), on behalf of petitioner A.T. Wall, Director of the Rhode Island Department of Corrections, moved to dismiss the habeas petition as time-barred. App. 5.

On December 12, 2007, the magistrate judge to whom the State's motion to dismiss had been referred issued a Report and Recommendation recommending that the district court dismiss Kholi's habeas petition with prejudice. App. 5. The magistrate judge determined that, since Kholi filed his habeas petition more than eleven years after his state court convictions became final in 1996, Kholi's petition would be time-barred unless the limitations period had been sufficiently tolled. App. 25-26. There was no dispute that Kholi's 1997 post-conviction relief application tolled the limitations period; nor was there any dispute that if Kholi's state sentence-reduction motion did not also toll the limitations period, his § 2254 petition would be untimely. App. 26.

The magistrate judge, embracing the holdings of three circuit courts (*Alexander v. Sec'y, Dep't of Corr.*, 523 F.3d 1291, 1297 (11th Cir. 2008); *Hartmann v. Carroll*, 492 F.3d 478, 483-84 (3d Cir. 2007); *Walkowiak v. Haines*, 272 F.3d 234, 239 (4th Cir. 2001)) while finding "unpersuasive" the reasoning of another (*Robinson v. Golder*, 443 F.3d 718, 720-21 (10th Cir. 2006)), determined that Kholi's "Motion under Rule 35 of the Rhode Island Superior Court Rules of Criminal Procedure was *not* a 'properly filed application for post-conviction or other collateral review' under

28 U.S.C. § 2244(d)(2), and therefore did not toll the limitations period." App. 27-30 (emphasis in original). Explained the magistrate judge:

> When a prisoner in State custody opts to file a motion that is a plea for leniency, the State is not being asked to correct legal errors. Whatever interest the State has in deciding the motion, its interest is not one in correcting errors before the Federal Courts assume jurisdiction. Moreover, if this Court was to hold that the Rule 35(a) Motion has the effect of tolling the limitations period of 28 U.S.C. § 2244(d)(1), it would create an incentive for prisoners to file frivolous requests for leniency merely as a delay tactic.

App. 30.

The magistrate judge's recommendation to grant the State's dismissal motion was accepted, over Kholi's objection, by the district court, which then dismissed Kholi's habeas petition with prejudice, and entered judgment for the State. App. 21.

Kholi then sought, in the United States Court of Appeals for the First Circuit, a certificate of appealability from the district court's dismissal of his § 2254 petition. "Recogniz[ing] the split in authority regarding whether a motion to reduce sentence may constitute a 'properly filed application for State post-conviction or other collateral review' under 28 U.S.C. § 2244(d)(2)," that such issue had "not yet [been] addressed" by "[t]he First Circuit," and that "the timeliness of [Kholi's] § 2254 petition turns on

whether his motion to reduce sentence acts as a tolling mechanism under § 2244(d)(2)," the Court of Appeals entered an unpublished Order on August 22, 2008, granting the certificate of appealability, and "invit[ing] further briefing on . . . [w]hether a post-conviction motion to reduce sentence, that seeks merely discretionary leniency and does not challenge the legality of the sentence or conviction, acts as a state tolling mechanism under 28 U.S.C. § 2244(d)(2)." The Court of Appeals further directed that the Federal Public Defender's office be appointed to represent Kholi. *Id.*

Following full briefing and oral argument, a panel of the First Circuit, on September 23, 2009, reversed the district court's order of dismissal. *Kholi v. Wall*, 582 F.3d 147 (1st Cir. 2009). In so doing, the panel determined, in relevant part, that although the Rule 35 motion filed by Kholi was indeed "a plea for [sentence] leniency," App. 9, it was also "obviously a motion that seeks state post-conviction review of that sentence," App. 11, and thus "self-evident[ly]" qualified as an "application for State post-conviction . . . review with respect to the pertinent judgment" under 28 U.S.C. § 2244(d)(2). App. 12. In so holding, the panel opined that the Court of Appeals for the Fourth Circuit in *Walkowiak*, 272 F.3d at 239, had wrongly interpreted the clause, "State post-conviction or other collateral review" in § 2244(d)(2), as encompassing collateral review only. App. 12-13. The First Circuit essentially concluded that the phrase "State post-conviction . . . review" includes, as well, applications

for direct or "supplemental" review of the relevant judgment. App. 13-14.

Expressing, moreover, its disagreement with the Courts of Appeals for the Eleventh and Third Circuits, *see Alexander*, 523 F.3d at 1297; *Hartmann*, 492 F.3d at 483-84, the panel's decision went on to explain why tolling during the time in which a state prisoner pursues even a purely discretionary sentence-reduction motion presents no "insult" to the AEDPA's "exhaustion requirement," and advances the AEDPA's concern that federal habeas corpus review take place only upon the conclusion of the state direct and collateral review process. App. 15-18. Concluding, then, "that a state post-conviction motion to reduce an imposed sentence that seeks purely discretionary leniency and does not challenge the validity of the conviction or sentence acts as a tolling mechanism within the purview of 28 U.S.C. § 2244(d)(2)," the Court of Appeals reversed the district court's order of dismissal and remanded the case for further proceedings. App. 19.

The Court of Appeals denied the State's motion for rehearing and rehearing *en banc* on October 20, 2009. App. 32.

Seeking review of the First Circuit's opinion and judgment, Petitioner submits the instant petition for writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE SPLIT ON WHETHER A STATE COURT SENTENCE-REDUCTION MOTION BASED ON A PLEA FOR LENIENCY TOLLS THE AEDPA'S LIMITATIONS PERIOD.

A. The First Circuit's decision that a motion for discretionary reduction of sentence qualifies as an "application for State post-conviction or other collateral review" under 28 U.S.C. § 2244(d)(2) squarely conflicts with published decisions from the Third, Fourth, and Eleventh Circuits.

In *Walkowiak*, a panel of the Fourth Circuit considered "[t]he straightforward issue [of] . . . whether a [sentence reduction] motion under Rule 35(b) [of the West Virginia Rules of Criminal Procedure] constitutes an application for 'State post-conviction or other collateral review' within the meaning of section 2244(d)(2)." *Walkowiak*, 272 F.3d at 236. Writing for the panel, Judge Luttig explained that, although "[t]he phrase 'State post-conviction or other collateral review' is not defined within the AEDPA," "under the plain language of section 2244(d)(2) – 'State post-conviction or *other* collateral review' (emphasis added) – the applicable one-year statute of limitations is tolled only for state *collateral*, post-conviction review." *Id.* at 236 (emphasis in original). Reinforcing its view that the phrase "State post-conviction or other collateral review" comprehends state *collateral* review only,

the Fourth Circuit cited this Court's language in *Duncan v. Walker*, 533 U.S. 167 (2001), wherein this Court noted that "Congress also may have employed the construction 'post-conviction or other collateral' in recognition of the diverse terminology that different States employ to represent the different forms of *collateral* review that are available after a conviction," *id.* at 177 (emphasis added).

Turning next to the meaning of "collateral review," the Fourth Circuit explained that since a sentence reduction motion under West Virginia Rule of Criminal Procedure 35(b) was, rather than "a proceeding separate and distinct from the proceeding in which the original judgment rendered," "part and parcel of the same proceeding in which the defendant was sentenced," it could not properly be characterized as a "collateral review" proceeding. *Walkowiak*, 272 F.3d at 237-38. Moreover, the Fourth Circuit explained, "'collateral' proceedings . . . typically entail a challenge to the legality of the earlier proceeding or judgment," and a motion under West Virginia Rule 35(b), which is simply a plea for leniency from a *presumptively valid* conviction, hardly does that. *Id.* The panel of the Fourth Circuit thus determined that a plea for a leniency-based sentence-reduction motion, being not "collateral review," fell outside of § 2244(d)(2)'s tolling provision. *Id.*

Likewise, examining a sentence-reduction motion filed under Delaware Superior Court Criminal Rule 35(b), the Third Circuit, in *Hartmann*, held that such a motion – merely "a plea for leniency, directed

toward the sentencing court, . . . seek[ing] discretionary relief based on mercy and grace, rather than on the law" – plainly did not come within the "State post-conviction or other collateral review" language of § 2244(d)(2). *See Hartmann*, 492 F.3d at 483. The Third Circuit further explained that a contrary holding would impede one important principle embedded in the AEDPA – finality of state court judgments – without at all advancing a competing one – exhaustion of state remedies, since "[w]hatever interest the state has in deciding [leniency-predicated sentence reduction] . . . motion[s], its interest is not one in correcting errors before the federal courts assume jurisdiction." *Hartmann*, 492 F.3d at 483. And it noted that if such sentence reduction motions *did* qualify as applications for "State post-conviction or other collateral review" under § 2244(d)(2), there would exist an "incentive for prisoners to file frivolous requests for leniency merely as a delay tactic." *Id.* at 484. The Third Circuit thus "conclude[d] that a motion for sentence reduction properly filed pursuant to Delaware Superior Court Criminal Rule 35(b) does not have the effect of tolling the limitations period set forth in 28 U.S.C. § 2244(d)(1)." *Id.*

The Court of Appeals for the Eleventh Circuit, in *Alexander*, similarly determined that a sentence-reduction motion only "request[ing] leniency from the sentencing court based on mitigating circumstances," *Alexander*, 523 F.3d at 1295, could not qualify as an "application for State post-conviction or other collateral review" under § 2244(d)(2). *Id.* at 1295, 1297-98.

And it, too, in arriving at its determination, took into account both the AEDPA's interest in the finality of state court judgments and the exhaustion of state court remedies. *Id.*; *see also Bridges v. Johnson*, 284 F.3d 1201, 1203-04 (11th Cir. 2002) (in holding that petitioner's application to a Georgia sentence review panel seeking discretionary sentence review did not constitute a post-conviction proceeding for the purposes of tolling AEDPA's limitations period, the court noted that the sentence review panel's sole task was to determine whether the sentence was excessively harsh, and thus reasoned that viewing the since-repealed Georgia statute as a means to toll the limitations period "would not enhance exhaustion of state remedies or finality of state court judgments."); *Davis v. Barrow*, 540 F.3d 1323, 1324 (11th Cir. 2008) (relying upon *Alexander* to hold that Georgia inmate's state court motion for reduced sentence did not toll the one-year limitation period).

B. The First Circuit's decision that a motion for discretionary reduction of sentence qualifies as an "application for State post-conviction or other collateral review," 28 U.S.C. § 2244(d)(2), is consonant with the view taken by the Tenth Circuit.

In *Robinson*, 443 F.3d at 720-21, the Tenth Circuit, albeit with limited discussion, held that a sentence reduction motion made pursuant to Colorado Rule of Criminal Procedure 35(b) qualified as an

"application for State post-conviction or other collateral review" under § 2244(d)(2). In so determining, the Tenth Circuit, citing to two prior unpublished decisions addressing the issue, mirrored the panel's concern in this case, App. 18, that a contrary holding would raise questions of comity, presumably because the Colorado sentence-reduction proceedings would be ongoing during the federal habeas proceeding. *See Robinson*, 443 F.3d at 720-21.

A number of months after its decision in *Robinson*, the Tenth Circuit, in *Howard v. Ulibarri*, 457 F.3d 1146, 1147-49 (10th Cir. 2006), reaffirmed its position, holding, as against the "contrary reasoning of the Fourth Circuit," that a motion for modification of sentence under New Mexico Rule of Criminal Procedure 5-801(B) tolled the AEDPA's limitations period.

C. There exists a clear and direct split among the circuits.

There exists, then, a clear and direct conflict among the Circuits – the First and the Tenth as against the Third, Fourth, and Eleventh – on the purely legal question of whether a motion filed in state court for discretionary sentence review is an "application for State post-conviction or other collateral review" under 28 U.S.C. § 2244(d)(2).

II. THE CIRCUIT SPLIT PRODUCES INCONSISTENT HOLDINGS AS TO THE RIGHTS OF STATE INMATES TO PURSUE FEDERAL HABEAS RELIEF, AND SIGNIFICANT UNCERTAINTY IN THOSE CIRCUITS THAT HAVE NOT YET DECIDED THE ISSUE.

More than 1.4 million individuals are incarcerated in state prisons. *See* Bureau of Just. Statistics, U.S. Dep't of Justice, Dec. 2009 Bulletin, NCJ 228230, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ppus08.pdf. Since a majority of the states have discretionary sentence-reduction provisions analogous to Rule 35 of the Rhode Island Rules of Criminal Procedure (indeed, at least one state within each Circuit has such a provision),[1] it is not surprising that the federal courts have had to, with some regularity, grapple with the issue of whether these familiar sentence-reduction motions qualify as a § 2244(d)(2) tolling mechanism. By virtue of the

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[1] *See, e.g.,* Alaska R. Crim. P. 35; Colo. R. Crim. P. 35; Conn. Gen. Stat. Ann. § 53a-39; D.C. Sup. Ct. R. Crim. P. 35; Del. Super. Ct. Crim. R. 35; Fla. R. Crim. P. 3.800; Haw. R. Pen. P. 35(b); Idaho Crim. R. 35; Ind. Code Ann. § 35-38-1-17 (West Supp. 2007); 730 Ill. Comp. Stat. 5/5-8-1 (West Supp. 2007); La. Code Crim. Proc. Ann. art. 881.1; Mass. R. Crim. P. 29; Md. R. 4-344, 4-345; Me. R. Crim. P. 35(c); N.D. R. Crim. P. 35; N.J. Ct. R. 3:21-10; N.M.R. Crim. P. 5-801; N.Y.R. Crim. P. 450.15, 450.30; Okla. Stat. Ann. tit. 22, § 982a (West 2003); Pa. R. Crim. P. 720; S.D. Codified Laws § 23A-31-1 (1998); Tenn. R. Crim. P. 35; Va. Code Ann. § 19.2-303 (Supp. 2007); 13 Vt. Stat. Ann. § 7042 (1998); W. Va. R. Crim. P. 35(b); Wis. Stat. § 973.195 (2006).

extant circuit split, state prisoners in the Third, Fourth, and Eleventh Circuits operate under a different tolling calculus than do state prisoners situated in the Tenth and, now, First Circuits. Interest in the uniform application of federal law in such a critical area as federal habeas corpus jurisprudence, should counsel against permitting such circuit inconsistency to persist. Especially, that is, on an important and recurring issue of federal habeas corpus procedure, a conflict among five circuits should not be left to fester.

Of even greater concern, to be sure, is that the five-circuit conflict creates real and substantial uncertainty within the seven circuits that have not yet addressed the question presented in this petition. The palpable and profound divide between the Third, Fourth, and Eleventh Circuits, and the Tenth and the First Circuits, on this significant and recurring issue, will, if allowed to persist, indubitably result in confusion and uncertainty among habeas litigants as to whether an application to a state court for the reduction of sentence tolls AEDPA's one-year limitations period.

As this Court has, in recent years, recognized the need for uniformity in the interpretation of AEDPA's tolling provision by resolving a number of conflicts arising out of the application of the limitations period, *see*, *e.g.*, *Allen v. Siebert*, 552 U.S. 3, 4 (2007) (effect of state-imposed time limit on AEDPA's limitation period); *Day v. McDonough*, 547 U.S. 198, 202 (2006) (effect of miscalculation by state court of

the elapsed time under AEDPA's limitations period); *Evans v. Chavis*, 546 U.S. 189, 192 (2006) (timeliness of an appeal filed three years after the lower court's judgment); *Lawrence v. Florida*, 549 U.S. 327, 329 (2007) (tolling effect of petition for writ of certiorari); *Pace v. DiGugliemo*, 544 U.S. 408, 410 (2006) (tolling effect of an untimely state post-conviction petition for writ of habeas corpus), it should likewise grant certiorari in this case and resolve the circuit split.

Finally, in resolving the circuit split presented in this case, this Court would likely define the contours of those state court submissions that are, or are not, contemplated by § 2244(d)(2)'s "State post-conviction or other collateral review" tolling provision. Given the sundry, often *pro se*, pleadings submitted in state court, it is not surprising that the federal courts have had to, again with some frequency, wrestle with determining whether a particular review motion is a tolling mechanism. *See, e.g., Harris v. Director, Va. Dep't of Corr.*, 282 F. App'x 239, 242-43 (4th Cir. 2008) (considering whether "mandamus petition" filed by Virginia inmate tolls); *Ali v. Tennessee Bd. of Pardon & Paroles*, 431 F.3d 896, 897 (6th Cir. 2005) ("assuming . . . for the sake of argument . . . that Tennessee court review of parole determinations is collateral for purposes of the tolling provision of 28 U.S.C. § 2244(d)(2)"); *Brown v. Sec'y, Dep't of Corr.*, 530 F.3d 1335, 1337-38 (11th Cir. 2008) (taking up whether DNA testing motion under Florida criminal rule qualified for tolling under § 2244(d)(2)); *Hutson v. Quarterman*, 508 F.3d 236, 238 (5th Cir. 2007) (same

question with respect to Texas DNA testing motion); *Streu v. Dormire*, 557 F.3d 960, 963-64 (8th Cir. 2009) (examining "whether a motion to reopen state post-conviction proceedings in Missouri is an 'application for State post-conviction or other collateral review' within the meaning of the tolling provision"); *Meadows v. Jacquez*, 242 F. App'x 453, 455 (9th Cir. 2007) (deciding whether California state prisoner's mandamus petition to compel production of medical records qualified for tolling); *Sindar v. Turley*, 2009 WL 2734661, at * 2 (10th Cir., Aug. 28, 2009) (deciding whether Utah prisoner's application for protective order and "malfeasance in office" complaints tolled the statute of limitations); *Voravongsa v. Wall*, 349 F.3d 1, 6-7 (1st Cir. 2003) (considering whether to toll while state motion to appoint counsel to assist in the filing of a post-conviction relief application was being reviewed). A decision from this Court resolving the circuit split on the issue presented will, necessarily, serve to more precisely explicate for the lower federal courts the metes and bounds of § 2244(d)(2)'s "State post-conviction or other collateral review" provision.

This Court's resolution of the widening conflict, then, would not only put to an end circuit inconsistency, and promote the uniform interpretation of an important and frequently applied clause in federal habeas corpus law, but would also provide guidance to the lower courts in assessing whether a particular state court application should toll AEDPA's one-year limitations period.

III. THE FIRST CIRCUIT'S DECISION IS NEITHER SUPPORTED BY THE PLAIN LANGUAGE OF 28 U.S.C. § 2244(d)(2), NOR CONSISTENT WITH THE LONG-STANDING INTEREST IN THE FINALITY OF STATE COURT JUDGMENTS.

This case presents the straightforward question of whether an application to a state court for the reduction of sentence based on a plea for leniency is an "application for State post-conviction or other collateral review with respect to the pertinent judgment" within the meaning of AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2) (emphasis added). In answering this question in the affirmative, and holding that the phrase "post-conviction . . . review" is not restricted to *collateral* review, App. 12-14, the First Circuit appears to have altogether overlooked the word "other" in § 2244(d)(2) ("application for State post-conviction or *other* collateral review") (emphasis added), effectively rewriting the clause to provide for tolling for the time during which a properly filed "application for [1] State post-conviction [review] or [2] collateral review" is pending. Section § 2244(d)(2), however, plainly does not read that way; the use of the word "other" in the phrase "*other* collateral review," *id.* (emphasis added), evidently indicates that "State post-conviction" applications must also be collateral.

As the Fourth Circuit explained in *Walkowiak*, "under the plain language of section 2244(d)(2) – 'State post-conviction or *other* collateral review' (emphasis added) – the applicable one-year statute

of limitations is tolled only for state *collateral*, post-conviction review." *Walkowiak*, 272 F.3d at 236 (emphasis in original). "This plain language interpretation of the section," the Fourth Circuit's decision went on to explain, "gives meaning to each and every word of the provision, which a reading of the statute to require tolling during *any* form of review after conviction (collateral or otherwise) would not." *Id.* at 236-37; *see also Malcom v. Payne*, 281 F.3d 951, 958 (9th Cir. 2002) (stating that "we know that the statute – by referring to '*other* collateral review' (emphasis added) – uses the term 'State post-conviction . . . review' as simply one type of 'collateral review.'"); *Duncan*, 533 U.S. at 177 (noting that "Congress also may have employed the construction 'post-conviction or other collateral' in recognition of the diverse terminology that different States employ to represent the different forms of *collateral* review that are available after a conviction," and that "Congress may have refrained from exclusive reliance on the term 'post-conviction' so as to leave no doubt that the tolling provision applies to all types of state *collateral* review after a conviction and not just to those denominated 'post-conviction' in the parlance of a particular jurisdiction.") (emphasis added); *Carey v. Saffold*, 536 U.S. 214, 216-17 (2002) (characterizing § 2244(d)(2) as providing for tolling during the time in which "an application for state *collateral* review is 'pending' in state courts.") (emphasis added).

Had the First Circuit, then, properly read "post-conviction . . . review" as contemplating one type,

indeed, the prototype, of state collateral review applications, *see Duncan*, 533 U.S. at 177 ("the term 'post-conviction' may denote a particular procedure for review of a conviction that is distinct from other forms of what conventionally is considered to be post-conviction review"), it would have recognized that the Rule 35 sentence-reduction motion filed by Kholi could only have been a tolling mechanism if it qualified as either (1) a collateral "post-conviction . . . review" application, or (2) some "other collateral review" application.

Since both types of tolling applications must constitute "collateral review," the Fourth Circuit in *Walkowiak*, 272 F.3d at 237, correctly sought the definition of such term, finding it to refer, after examining the Black's Law Dictionary definition of "collateral attack," "to a proceeding separate and distinct from that in which the original judgment was rendered." *Walkowiak*, 272 F.3d at 237 (*citing Black's Law Dictionary* (7th ed. 1999)).

Did the plea-for-leniency sentence-reduction motion filed by Kholi initiate "a proceeding separate and distinct from that in which the original judgment was rendered"? Since such "motion is filed in the original criminal case," App. 14, comes before the same sentencing judge, *see, e.g., State v. Brown*, 821 A.2d 695, 697 (R.I. 2003) ("Rule 35 motions for reduction of sentence appropriately are heard by the original sentencing justice"), merely seeks (and only "during a limited period after sentencing") "leniency" from the sentencing judge (Reporter's Notes to

Rule 35 of the Rhode Island Superior Court Rules of Criminal Procedure), does not challenge the lawfulness of the original sentence, *see, e.g., State v. Byrnes*, 456 A.2d 742, 744 (R.I. 1983) (Rule 35's sentence reduction provision "authorizes a court to reduce a *lawful* sentence") (emphasis added), and is obviously not precluded or estopped by the earlier sentencing proceeding, *see, e.g., id.* at 745 (sentence may be reduced at trial judge's discretion if she decides "that the sentence originally imposed was, for any reason, unduly severe"), it should be clear that the Rule 35 motion filed by Kholi did *not* initiate "a proceeding separate and distinct from that in which the original judgment was rendered," *Walkowiak*, 272 F.3d at 237. Because, that is, such sentence-reduction motion was "part and parcel of the original proceeding in which the defendant was sentenced," *id.* at 237, was, actually, "one in the same with the original proceeding in which the sentence was actually imposed," *id.*, the First Circuit should have recognized that Kholi's sentence-reduction motion was hardly a "proceeding[ ] . . . supplementary to the underlying criminal case," App. 14-15 n.6, and was, thus, not any type of *collateral* review application pursuant to § 2244(d)(2).

Moreover, while the First Circuit's opinion rightly pointed to the AEDPA's concern with "principles of comity and federalism," App. 16, its interpretation of § 2244(d)(2) too easily dismissed Congress' equally important concern with the finality of state court judgments of conviction. One of the reasons, indeed,

that Congress enacted the AEDPA was to "combat increasingly pervasive abuses of the federal courts' habeas jurisdiction," *Delaney v. Matesanz*, 264 F.3d 7, 10 (1st Cir. 2001) (*citing Felker v. Turpin*, 518 U.S. 651, 664 (1996)), and the one-year limitations period in 28 U.S.C. § 2244(d)(1) "quite plainly serves the well-recognized interest in the finality of state court judgments," *Rhines v. Weber*, 544 U.S. 269, 276 (2005). Like the Third and Eleventh Circuits recognized in *Hartmann* and *Alexander*, then, the First Circuit, in its analysis of whether a sentence-reduction motion is a tolling mechanism, should have recognized that tolling the limitations period during the pendency of a sentence-reduction motion does substantial violence to the well-recognized interest in the finality of state court judgments, without at all advancing the AEDPA's exhaustion requirement, since "[w]hatever interest the state has in deciding [leniency-predicated sentence reduction] . . . motion[s], its interest is not one in correcting errors before the federal courts assume jurisdiction." *Hartmann*, 492 F.3d at 483.

In any event, the below opinion of the First Circuit has substantially widened the circuit split on the question whether state motions for discretionary sentence review toll the AEDPA's limitation period under § 2244(d)(2), and this Court should accept review to resolve the narrow legal question presented in this petition.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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